UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 32

Docket No. DA-0752-11-0475-C-1

Debra L. Walker-King,

Appellant,

v.

Department of Veterans Affairs,

Agency.

April 17, 2013

Gloria J. Smith, Dallas, Texas, for the appellant.

Kurt P. Martin, Esquire, Dallas, Texas, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member
Member Robbins issues a separate dissenting opinion.

OPINION AND ORDER

¶1 The appellant has filed a petition for review asking us to reconsider the compliance initial decision issued by the administrative judge denying the appellant's petition for enforcement. For the reasons discussed below, we

GRANT the appellant's petition for review and REMAND the case to the regional office for further adjudication in accordance with this Opinion and Order. [1]

BACKGROUND

¶2 The agency removed the appellant from her position as a General Supply Specialist, GS-9, effective May 11, 2011. Initial Appeal File (IAF), Tab 4, Subtab 4. The appellant and the agency entered into a settlement agreement resolving the appellant's removal appeal. IAF, Tab 8. The settlement agreement provided in relevant part:

> If [the appellant] is physically qualified and returns to duty no later than December 1, 2011, the parties agree to reinstate her to employment with the Agency effective May 11, 2010, the date of her Removal. [The appellant] understands and agrees that prior to being reinstated she must complete and pass a pre-employment physical, and that it is her responsibility to arrange and complete the pre-employment physical.

Id. at 2. The settlement agreement further provided that "[the appellant] will be reinstated with the Agency as a GS-7, step 10 Gastroenterology Health Technician." *Id*. at 3. The administrative judge accepted the settlement into the record for enforcement purposes and dismissed the appeal on October 19, 2011. IAF, Tab 9.

¶3 The appellant completed a pre-employment physical examination with a treating physician for the health technician position on November 30, 2011. Petition for Enforcement (PFE) File, Tab 3, Attachment 4. The appellant's orthopedic surgeon provided the treating physician a Department of Labor Work Capacity Evaluation dated October 7, 2011, reflecting that the appellant could not

---

[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

use her right arm for 3 to 4 months as a result of rotator cuff surgery she underwent in September 2011. *Id*. at 7. The treating physician stated that the "health technician (GI) will need accommodation if hiring to occur at this time. Not qualified without accommodation." *Id*. at 6 (emphasis in original). On December 1, 2011, Barbara Rogers, the agency's human resources chief, noted on the pre-employment physical that the appellant was not selected for appointment and that "candidate [is] currently unable to perform essential duties of position." *Id*.

¶4 Separately, on December 2, 2011, the appellant contacted the agency and left a voicemail message stating that she "did fail my physical because I'm physically not ready to come back to work just yet. . . . [H]opefully next month, I'll be ready to come back to work." PFE File, Tab 3, Attachment 2. On December 20, 2011, the appellant sent the agency correspondence in which she stated that she intended to return to work on January 3, 2012, and, in response, Ms. Rogers informed the appellant via letter dated December 29, 2011, that she had already been separated from employment with the agency because she had failed a pre-employment physical and was therefore not physically qualified to perform the work required of the health technician (GI) position. PFE File, Tab 3, Attachment 3.[2]

¶5 The appellant filed a petition for enforcement on January 5, 2012, alleging a breach of the settlement agreement. PFE File, Tab 1. The agency responded to the appellant's petition for enforcement arguing that the appellant's treating physician opined that the appellant "was not qualified without accommodation" and noting that the appellant left a voicemail message explaining that she was not ready to return to work as of early December 2011. PFE File, Tab 3 at 1. The administrative judge held a telephonic close of record conference on March 14, 2012, during which she identified the issue in the appellant's enforcement

[2] The appellant's December 20, 2011 letter is not included in the record.

proceeding as "whether the appellant should have been reinstated to her position on or before December 1, 2011, following her pre-employment physical." PFE File, Tab 10 at 1. The administrative judge noted that the record would remain open until March 28, 2012. *Id.* On March 22, 2012, through a newly-designated representative, the appellant argued that she reported to the pre-employment physical as required by the settlement agreement and that she believed that the agency would assist her in obtaining a reasonable accommodation under the Rehabilitation Act in connection with her efforts to return to work. PFE File, Tab 12 at 2. The agency filed a supplemental response on March 28, 2012, again noting that the appellant stated in her December 2011 voicemail message that she was unable to work as of December 1, 2011, and emphasizing that the appellant's pre-employment physical reflected that the appellant was unable to perform certain physical activities and that she was not physically qualified to return to work. PFE File, Tab 13 at 1.

¶6 The administrative judge issued a compliance initial decision on May 4, 2012, denying the appellant's petition for enforcement. PFE File, Tab 15. The administrative judge provided a lengthy chronology of the appeal and the parties' arguments and concluded that the appellant was not physically qualified to perform in the health technician position on or before December 1, 2011; that the appellant indicated that she was not ready to return to work by this date; and that the appellant, therefore, could not establish that the agency breached the terms of the settlement agreement. *Id.* at 7.

¶7 The appellant has filed a petition for review in which she raises allegations of race and gender discrimination for the first time; alleges that "they even looked pass [sic] my disability status"; complains of not receiving workers' compensation payments; and charges that the administrative judge discriminated against her. *See* Petition for Review (PFR) File , Tab 1 at 3, 8-9. The agency has not filed a response to the appellant's petition for review.

ANALYSIS

The appellant's allegation that she satisfied the definition of "physically qualified" in the settlement agreement requires further adjudication.

¶8 The appellant argued below that the agency breached the settlement agreement when it failed to return her to work after the treating physician determined that she was "not qualified without accommodation." PFE File, Tab 12 at 1-2. As explained below, because the term "physically qualified" is not defined in the settlement agreement, and because it could be subject to more than one reasonable interpretation, it constitutes an ambiguous term requiring consideration of extrinsic evidence. Accordingly, remand of the petition for enforcement to the administrative judge is necessary for consideration of extrinsic evidence as to the parties' understanding of the term "physically qualified" when they entered into the agreement.

¶9 A settlement agreement is a contract, and the Board will adjudicate a petition to enforce a settlement agreement in accordance with contract law. *Young v. U.S. Postal Service*, 113 M.S.P.R. 609, ¶ 10 (2010). The party seeking enforcement of the settlement agreement bears the ultimate burden of showing the other party breached the agreement. *Id.* In order to establish a breach of a settlement agreement, the petitioning party "must show material noncompliance" with a term of the contract. *Id.* (quoting *Lutz v. U.S. Postal Service*, 485 F.3d 1377, 1381 (Fed. Cir. 2007)). A party's breach of an agreement is material when it relates to a matter of vital importance or goes to the essence of the contract. *Id.*

¶10 When reviewing a contract dispute, the "Board is responsible for ensuring that 'the parties receive that for which they bargained.'" *Id.*, ¶ 15 (quoting *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368, 1372 (Fed. Cir. 1999)). Contract terms must be read "'as part of an organic whole, according reasonable meaning to all of the contract terms[.]'" *Id.* (quoting *Lockheed Martin IR Imaging Systems, Inc. v. West*, 108 F.3d 319, 322 (Fed. Cir. 1997)). "A contract is ambiguous when it is susceptible to differing, reasonable interpretations." *Id.*,

¶ 16. When a term is ambiguous, consideration of extrinsic evidence is appropriate to determine the intent of the parties at the time they entered into the agreement. *Id.*

¶11 The appellant advances that the term "physically qualified" incorporates whether she could perform the essential functions of the health technician job with a reasonable accommodation under the Rehabilitation Act of 1973. PFE File, Tab 12. The agency asserts that that term excludes such a consideration. PFE File, Tab 13. The term "physically qualified" is not defined in the settlement agreement, and the parties' competing definitions of the term reflect that the term could be subject to "differing, reasonable interpretations." *See Young*, 113 M.S.P.R. 609, ¶ 16. The absence of any express condition in the agreement requiring the agency to provide the appellant an accommodation is not necessarily fatal to the appellant's claim. *Id.*, ¶ 15.

¶12 Because the term "physically qualified" is subject to possible differing, reasonable interpretations, remanding the petition for enforcement to the administrative judge to consider extrinsic evidence of the parties' intent is appropriate. In making this assessment, the administrative judge should determine: (1) whether the parties had differing, albeit reasonable, interpretations of the term "physically qualified"; (2) whether neither party had reason to know of the meaning of the term used by the other party; and (3) whether the term is an essential part of the settlement. *See Young*, 113 M.S.P.R. 609, ¶ 20. In making this assessment, the administrative judge may consider the legal definition of the term "qualified" within the Rehabilitation Act of 1973 and its accompanying regulations. *See id.*, ¶ 39 n.4 (parties are presumed to be aware of applicable statutes and regulations and intend to incorporate them into contracts). If the administrative judge answers "yes" to each of these questions, then the parties would not have had a meeting of the minds regarding the meaning of the term "physically qualified," and the settlement agreement could be set aside in its entirety. *See Young*, 113 M.S.P.R. 609, ¶ 20. Should the

administrative judge reach such a conclusion, the appellant would be afforded the opportunity either to (1) set aside the settlement agreement and reinstate her prior initial appeal; or (2) accept the agreement under the agency's interpretation of the agreement. *See id.*

¶13 We find that the agency's separate argument that the appellant was in breach of the settlement agreement when she declared that she was not ready to return to work on December 2, 2011, is unavailing. PFE File, Tab 13 at 1. Although the appellant stated in a voicemail message that she was not ready to return to work on December 2, 2011, the agency was already on notice as of December 1, 2011, that the appellant might require a reasonable accommodation to perform the essential functions of the health technician position. PFE File, Tab 3, Attachment 4 at 6. The appellant's after-the-fact statement that she was not ready to come back to work on December 2, 2011, does not alter the agency's potential obligation under the agreement to offer the appellant an accommodation to perform the health technician position if the administrative judge determines that the term "physically qualified" reasonably incorporated the definition of "qualified" under the Rehabilitation Act of 1973. *See, e.g.*, *Gonzalez-Acosta v. Department of Veterans Affairs*, 113 M.S.P.R. 277, ¶ 15 (2010) (noting that an agency needs to engage in the interactive process when the agency is aware of the need for accommodation) (citing *Conneen v. MBNA America Bank, N.A.*, 334 F.3d 318, 332 (3d Cir. 2003)).

The appellant's discrimination, bias, and workers' compensation arguments do not provide a basis for disturbing the compliance initial decision.

¶14 We reject the appellant's argument that the administrative judge discriminated against her. To prevail on a claim of bias by an administrative judge, an appellant must overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *Oliver v. Department of Transportation*, 1 M.S.P.R. 382, 386 (1980). An administrative judge's conduct during the course of a Board proceeding warrants a new adjudication only if his

comments or actions evidence a deep-seated favoritism or antagonism that would make fair judgment impossible. *Smets v. Department of the Navy*, 117 M.S.P.R. 164, ¶ 15 (2011). The appellant's allegations on review neither overcome the presumption of honesty and integrity that accompanies an administrative judge, nor establish that the administrative judge showed a deep-seated favoritism or antagonism that would make fair judgment impossible. Her claim of discrimination by the administrative judge therefore does not warrant disturbing the compliance initial decision.

¶15 We also reject the appellant's new claims of race and gender discrimination by the agency. The appellant's discrimination claims are vague (she does not identify who discriminated against her or how she was discriminated against), and they appear to be raised for the first time on review. Generally, new claims may not be presented for the first time on review. *See Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980). Moreover, the Board lacks jurisdiction to hear pendent discrimination claims in connection with a petition for enforcement of a settlement agreement. *King v. Reid*, 59 F.3d 1215, 1219 (Fed. Cir. 1995); *Diehl v. U.S. Postal Service*, 82 M.S.P.R. 620, ¶ 11 (1999). Therefore, the appellant's discrimination claims should not be considered on review.

¶16 Lastly, the appellant's contention that she "never received worksman [sic] compensation for my surgery" is not properly before the Board. Pursuant to the Federal Employees' Compensation Act, 5 U.S.C. § 8101, *et seq.*, the Department of Labor's Office of Workers' Compensation Programs is charged with overseeing and administering workers' compensation benefits. *See* 5 U.S.C. §§ 8124, 8145; 20 C.F.R. § 10.1. The nature of the appellant's claims reflects that she is asserting a substantive claim to workers' compensation benefits, which is not properly before the Board. *See Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659, ¶ 20 (2009), *aff'd*, 420 F. App'x 980 (Fed. Cir. 2011).

ORDER

¶17 For the reasons discussed above, we REMAND this case to the regional office for further adjudication in accordance with this Remand Order.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.

OPINION OF MEMBER MARK A. ROBBINS

in

Debra L. Walker-King v. Department of Veterans Affairs

MSPB Docket No. DA-0752-11-0475-C-1

¶1 I respectfully dissent.

¶2 We are stretching to find ambiguity where none exists within the plain meaning of the language of the settlement agreement between the appellant and agency. The term "physically qualified", as used in the settlement agreement is neither ambiguous nor subject to "differing, reasonable interpretations." *Young v. U.S. Postal Service*, 113 M.S.P.R. 609, ¶ 16 (2010).

¶3 The term is simple and unmodified. Likewise, adding the modifier "with reasonable accommodation" after the term would also have been simple and unambiguous. Had the appellant intended the meaning of the modified term, or a definition possibly consistent with either the Rehabilitation Act of 1973, or the Americans with Disabilities Act of 1990, she should have insisted that that language or citations to those statutes be included in the settlement agreement, as she was free to do.

¶4 I agree with the analysis and discussion of the appellant's discrimination, bias and workers' compensation claims.

_____

Mark A. Robbins
Member